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Court of Appeals  
Division III  
State of Washington  
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Appeal No.: 35825-9

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IN THE COURT OF APPEALS, DIVISION 3  
OF THE STATE OF WASHINGTON

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GRIGG FAMILY, LLC,

Appellant,

AND

THE CITY OF WEST RICHLAND,  
Appellant,

v.

EDWARD COYNE, et ux., et al.,

Respondents.

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OPENING BRIEF OF APPELLANT GRIGG FAMILY, LLC

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## **I. INTRODUCTION**

This case comes before the Court in a continuance of a long-lived dispute over what the landowners in question may and may not use their land for. Dispositive of the ultimate issue is the restrictive covenants that burden the subject land. Despite the Respondents' interpretation, the restrictive covenants clearly and unambiguously allow for Appellant, Grigg Family, LLC's proposed use of its land.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in granting the Respondents' Motion for Summary Judgment. CP 142.
2. The Superior Court erred in denying the Appellant, Grigg Family, LLC's, Motion for Summary Judgment. CP 142.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Superior Court erred in considering "surrounding circumstances" to interpret the restrictive covenants when the restrictive covenants' language is clear and unambiguous.
2. Whether the Superior Court erred in extending, by implication, the restrictive covenants to include restrictions not clearly expressed therein.

3. Whether the Superior Court erred in finding that Grigg Family, LLC's proposed use does not comply with the clear and unambiguous language of the restrictive covenants.

4. Whether Appellant is entitled to attorney fees and costs on appeal pursuant to RAP 18.1.

#### **IV. STATEMENT OF THE CASE**

In 2011, Grigg Family, LLC ("Grigg") purchased Lot 29 in the Canal Heights neighborhood of West Richland, Washington ("Canal Heights"). CP 20. In 2013 Grigg purchased the adjacent Canal Heights lot, Lot 1. CP 20. As the owner of hardware stores, Grigg purchased Lots 1 and 29 with the intention of building a new hardware store ("Store"). CP 32.

In an effort to stop Grigg, the Respondents employed a number of legal tactics. CP 32. Respondents filed a claim under the Land Use Petition Act, which was dismissed, and a complaint to the Growth Management Hearing Board, which was also dismissed. CP 32. Respondents later appealed the Growth Management Hearing Board's dismissal to the Superior Court and the Court of Appeals, with Grigg being successful on the merits for both. CP 32.

Respondents also filed a declaratory action in the Superior Court, claiming that the lots in Canal Heights are subject to certain recorded

restrictive covenants (“covenants”).CP 32. According to Respondents, the restrictive covenants designate the lots as residential, and thus no commercial use of the lots is permitted. CP 3. Respondents claim that because the restrictive covenants state that the lots must be designated as residential that the lots may only be used for residential use and/ or purposes. CP 3. However, Respondents’ assertion is incorrect as the restrictive covenants do not contain any such restriction on the lots. CP 36.

Rather, the plain language of the restrictive covenants clearly allows for commercial and other non-residential uses of the lots. CP 36. Accordingly, Grigg’s proposed use of Lots 1 and 29 does not violate the clear unambiguous language of the restrictive covenants. CP 20—28.

In the lower court, the parties filed cross motions for summary judgment. CP X; RP 142. The lower court considered the parties’ filings and heard oral argument. CP 141—42. The lower court ruled in favour of Respondents and granted their Motion for Summary Judgment. CP 142. In turn, the lower court denied Appellant, Grigg’s, Motion for Summary Judgment. CP 142. Grigg then timely brought this appeal.

## **V. ARGUMENT**

### **A. Standard of Review**

Summary judgment rulings are afforded *de novo* review. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). Thus, “when

reviewing an order granting summary judgment, [the appellate court] engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Kahn v. Salnero*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

The trial may only grant summary judgment if there is no genuine dispute of material facts and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. Cnty. Of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). This Court “may affirm a trial court’s disposition of a summary judgment motion on any basis supported by the record.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008) (citing *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994)).

The facts in this case are undisputed. Under the applicable standard, summary judgment should be granted to the party with whom the law sides. Here, the law clearly sides with and supports the position of Appellant, Grigg. Thus, the trial court should have granted Grigg’s Motion for Summary Judgment and Denied Respondent’s Motion for Summary Judgment.

#### **B. Applicable Law**

Interpreting the language of a restrictive covenant is a question of law. *Krein v. Smith*, 60 Wn. App. 809, 811, 807 P.2d 906, *rev. denied*, 117

Wn.2d 1002 (1991). “[T]he following rules govern the interpretation of restrictive covenants:

(1) The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning.

(2) Restrictions, being in derogation of the common-law right to use land for all lawful purposes, **will not be extended by implication to include any use not clearly expressed**. Doubts must be resolved in favor of free use of land.

(3) The instrument must be considered in its entirety, and surrounding circumstances are to be taken into consideration when the meaning is doubtful.”

*Parry v. Hewitt*, 68 Wn.App. 664, 669, 847 P.2d 483 (1992) (hereinafter *Parry*) (citing *Burton v. Douglas Cty.*, 65 Wn.2d 619, 621, 399 P.2d 68 (1965) (*emphasis added*)).

When read in their entirety, the original August 5, 1948, restrictive covenants stated as follows:

“1. All lots in said plat, except Lot 30, shall be known and be described as residential lots. No structure shall be erected, altered, placed or to be permitted to remain on any residential building lot other than one detached, single-family dwelling, not to exceed two stories in height, and a private garage for not more than two cars.

2. No residential structure shall be placed on any lot unless prior thereto or simultaneously therewith a septic tank installation is made in a manner approved by the Health Department, and all structures commenced to be built on said lot shall be completed within two years of the date of the commencement of such construction.

3. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be a nuisance to the remaining lots. No residential structure shall be erected or placed on any single lot with less than 600 square feet of floor space.” CP 36.

Then, on January 6, 1949, the restrictive covenants were subject to the following amendment:

“By Amendment recorded on January 6, 1949...paragraph 1 above now reads as follows; all lots in said plat, except lot 30, shall be known and be described as residential lots.” CP 36.

Thus, the January 6, 1949 amendment re-wrote the restrictive covenants to the following:

“1. All lots in said plat, except Lot 30, shall be known and be described as residential lots.

2. No residential structure shall be placed on any lot unless prior thereto or simultaneously therewith a septic tank installation is made in a manner approved by the Health Department, and all structures commenced to be built on said lot shall be completed within two years of the date of the commencement of such construction.

3. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be a nuisance to the remaining lots. No residential structure shall be erected or placed on any single lot with less than 600 square feet of floor space.” CP 36.

Here, the restrictive covenants’ language is clear and unambiguous. CP 36. In fact, the Respondents failed to raise any argument that the language was ambiguous or that its meaning was doubtful. *See* RP 1—43. If anything, the Respondents agreed that the restrictive covenants’

language is clear and unambiguous. Therefore, under Washington law, the court must afford the language its manifest meaning without considering the “surrounding circumstances,” unless the court finds the language’s meaning doubtful. *Parry*, 68 Wn.App. at 669.

Furthermore, the court cannot extend, by implication, the restrictive covenants to restrict any use not clearly expressed therein. *Id.* Doing so would be contrary to well established case law. *Id.*; *see also* *Burton v. Douglas Cty.*, 65 Wn.2d 619, 621, 399 P.2d 68 (1965).

**C. Because the restrictive covenants’ language is clear and unambiguous, the trial court committed error when it considered the “surrounding circumstances” in interpreting the restrictive covenants.**

In support of their Motion for Summary Judgment, Respondents argued that Grigg’s proposed use of Lots 1 and 29 would be in derogation to the “general building scheme” in Canal Heights. CP 50. In support, Respondents provided pictures of the Canal Heights area and pictures of Grigg’s other hardware stores in the area to demonstrate that Grigg’s proposed use was not within the “general building scheme.” CP 83—113.

The Respondents did not rely on the restrictive covenants to support their claim that Canal Heights has a “general building scheme” because the restrictive covenants’ clear and unambiguous language is devoid of any such “scheme.” *See* CP 36. In fact, the restrictive covenants

have no restrictions on what types of buildings or structures Canal Heights landowners can build because all structure restrictions were explicitly eliminated with the January 6, 1949 amendment. CP 36.

These arguments relied on the circumstances surrounding the restrictive covenants and the land involved. They did not, however, rely upon the restrictive covenants' language. As such, the lower court should not have considered these surrounding circumstances to interpret the restrictive covenants' language unless the lower court found the meaning of the restrictive covenants' language doubtful or ambiguous. *Parry*, 68 Wn.App. at 669

The lower court's interpretation of the restrictive covenants is in error because the lower court considered "surrounding circumstances" without finding the language of the restrictive covenants doubtful or ambiguous. CP 140—142. In fact, the lower court blatantly misstated applicable law in interpreting the restrictive covenants—

"So in *Burton*, the 1965 case, in interpreting the restrictive covenants the primary objective is to determine the intent of the parties, and in doing that clear and unambiguous language will be given manifest meaning. You consider the instrument as well in its entirety and surrounding circumstances are to be taken into consideration." RP 35. (emphasis added)

Case law is clear—the lower court cannot consider surrounding circumstances unless the meaning of the restrictive covenants’ language is doubtful. *Parry*, 68 Wn.App. at 669; *Burton*, 65 Wn.2d at 621.

Contrary to case law, the lower court largely relied upon the “surrounding circumstances” to reach a decision that Grigg’s proposed use on Lots 1 and 29 did not comply with the intent of the restrictive covenants. RP 38—40. Specifically, the lower court relied upon the following “surrounding circumstances” in ruling that the restrictive covenants do not include Grigg’s proposed use on Lots 1 and 29—

“So what I’m required to do is look at this document in its entirety and then also look at surrounding circumstances. I think the photographs speak for themselves about what the surrounding circumstances are in this particular development, which is Canal Heights, and so as you – as this Court considers what, in fact exists as trades, there’s really nothing to speak of to commensurate with a Griggs store.” RP 38. (emphasis added)

“So when you consider the surrounding circumstances the Court takes note of that. I don’t think anybody can dispute that. There’s no such thing [like a hardware store] in that area.” RP 39 (emphasis added)

“I think that paragraph three of the covenants, given the surrounding circumstances and the documents in its entirety, would contemplate, as indicated [by Respondents] hobby agriculture, produce stands, things like that, not a building as the size as has been shown with the related traffic for such commerce...” RP 40 (emphasis added)

In order to consider these surrounding circumstances, the lower court had to first determine that the meaning of the restrictive covenants’

language was doubtful and/ or ambiguous. *Parry*, 68 Wn.App. at 669; *Burton*, 65 Wn.2d at 621. The lower court did not do so. RP 38—40. Therefore, the lower court committed error when it considered the surrounding circumstances in reaching its decision. The lower court’s ruling should be reversed.

**D. The trial court committed error when it extended, by implication, the restrictive covenants to restrict the use of Canal Heights lots for Grigg’s proposed commercial use when such restriction is not clearly expressed in the restrictive covenants.**

First, the lower court acknowledged that the restrictive covenants do not specifically restrict use of the Canal Heights lots to *only* residential uses—

“[T]he question becomes even though we don’t have the [residential] use provision, Mr. Davis makes that point in his materials, doesn’t talk about it has to be used for that. There’s no doubt that’s true, but I’m not sure that’ where ultimately this case is resolved.” RP 39. (emphasis added).

Despite this acknowledgment, the lower court went on to extend, by implication, the restrictions under the restrictive covenants to essentially only residential uses.

Largely relying upon the surrounding circumstances, which was also an error, the lower court found that while the restrictive covenants allow for trade, the restrictive covenants do not allow for the trade activity proposed by Grigg. RP 39—40. Specifically, the restrictive covenants do

not allow for large-scale commercial trade, but do allow for “hobby agriculture, produce stands, things like that...” RP 40. This ruling contravenes case law because the lower court extended restrictions under the restrictive covenants when the restrictive covenants do not contain said restrictions. *Parry*, 68 Wn.App. at 669; *Burton*, 65 Wn.2d at 621. Furthermore, the ruling was based on examples given by Respondents’ attorney of the activities the restrictive covenants drafters likely intended to allow. RP 10—12.

What is even more frustrating about these errors is the lower court extended the trade restriction when the clear and unambiguous language of the restrictive covenants allows for trade activity. If the restrictive covenants’ drafters intended for no trade activity to occur or only small-scale operations, they could have so indicated. *See Burton*, 65 Wn.2d at 622. However, the restrictive covenants are completely devoid of any such restriction on the commercial trade activity Grigg wishes to engage in on its property.

The lower court’s extension of restrictions by implication was clear error. Thus, the lower court’s decision should be reversed.

**E. The trial court erred in denying Grigg’s Motion for Summary judgment because as a matter of law, Grigg’s proposed use of Lots 1 and 29 complies with the clear and unambiguous language of the restrictive covenants.**

Had the lower court interpreted the language of the restrictive covenants pursuant to applicable law, the lower court would have had no other choice but to grant Grigg’s Motion for Summary Judgment because Grigg’s proposed use complies with the clear and unambiguous language of the restrictive covenants.

1. Analogous case law supports Grigg’s interpretation of the restrictive covenant’s clear and unambiguous language.

In *Burton v. Douglas County*, the court found that building a parking lot in the middle of a subdivision did not violate the applicable covenants. 65 Wn.2d 619, 624, 399 P.2d 68 (1965). The applicable covenants stated the following: “(2) No building shall be erected on any building plot except on detached single-family dwelling...(3) No noxious or offensive or business trade shall be carried on upon said premises or permitted thereon...” *Id.* at 620.

The golf and country club that operated a golf course within the subdivision purchased a few plots to build a 35 car parking lot. *Id.* at 621. In interpreting the covenant’s plain language, the court found that the parking lot was a permitted use.

First, the court found that “although no structure other than a detached single-family dwelling was permitted, it was *not* intended that the land should be used for residential purposes only. Land may be used without a structure thereon, and here there is no express covenant prohibiting such use.” *Id.* at 622 (citing *Granger v. Boulls*, 21 Wn.2d 597, 152 P.2d 325 (1944) (emphasis added). Furthermore, “[h]ad the intent been to restrict to residential use only, the parties could have so provided.” *Id.* at 622.

Second, “[t]he fact that the parties designated ‘noxious or offensive or business trade’ as the only prohibited nonresidential uses is clear evidence of their intention that other nonresidential uses were permissible.” *Id.* Because the parking lot was not noxious, offensive, or a business trade, the parking lot was a permitted use. *Id.*

When read in their entirety, there is no doubt that the restrictive covenants in question allow Grigg’s proposed use of Lots 1 and 29. CP 36. First, similarly to *Burton*, the covenants in question do not have a clearly expressed covenant restricting the use of Canal Heights to only residential uses. CP 36. The lots must be described or known as residential; however, there is no express covenant limiting the uses and/ or purposes of the lots to *only* those that are residential. CP 36. Without a “clearly expressed” restriction on the use or purpose, a restriction on how to describe the lots

cannot be extended by implication to include a restriction on the lots' use or purpose. *Burton*, 65 Wn.2d at 624; *Parry*, 68 Wn.App. at 669. Had the parties intended to restrict the use of Canal Heights to only residential uses and/ or purposes, they could have so provided. *See Burton*, 65 Wn.2d at 622.

Second, the restrictive covenants in question allow for any type of structure to be built in Canal Heights. CP 36. Because of the January 6, 1949 amendment, there is no longer any requirement that the structures be "residential." CP 36. This clearly demonstrates the parties' intent to allow for nonresidential structures to be built in Canal Heights. *See Burton*, 65 Wn.2d at 622. Accordingly, it is clear that in only mandating that the lots be described as residential, the parties did not intend to limit the use of the lots to only residential uses. This intent is especially clear in light of *Burton*. *See Burton*, 65 Wn.2d at 619—22.

In *Burton*, the covenants only allowed for single-family dwellings, but they did not prohibit the use of the lots to residential use only. *Burton*, 65 Wn.2d at 622. Accordingly, the court found that even in restricting the land to only residential buildings, the parties did not intend to limit the use of the land to only residential use because the covenants lacked a clear expression of such intent. *Id.* Here, the covenants in question allow for any type of structure and lack any provision prohibiting use to residential uses

only. CP 36. Accordingly, the parties to the covenants in question clearly intended to allow nonresidential uses in Canal Heights. CP 36.

Rather than ban or restrict, the covenants clearly permit lot owners to use their lots for commercial and other nonresidential purposes. Paragraph three (3) of the covenants explicitly allows lot owners to conduct “trade” on their lots. CP 36. “Trade” is defined as, “the act or business of exchanging commodities by barter; or the business of buying and selling for money.”<sup>1</sup> Furthermore, paragraph three (3) also allows lot owners to conduct other “activity” on their lots. CP 36. Once again, the covenants are completely devoid of any specific limitations of the lots to only residential use and/ or purposes. CP 36.

The only prohibition in the restrictive covenants in question is that the trade or other activities on the lots cannot be noxious, offensive, or a nuisance. CP 36. The restrictive covenants only prohibit nonresidential use that is noxious, offensive, or a nuisance. This is clear evidence of the parties’ intention that trade and other nonresidential activities that are not noxious, offensive, or a nuisance are permissible. CP 36; *Burton*, 65 Wn.2d at 622. “Had the intent been to restrict to residential use only, the parties could have so provided.” *Burton*, 65 Wn.2d at 622.

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<sup>1</sup> BLACK’S LAW DICTIONARY 1665 (4th ed. 1968).

Accordingly, because the restrictive covenants in question clearly allow for nonresidential uses of Canal Heights the Court must determine if as a matter of law, Grigg's proposed uses of Lots 1 and 29 comply with the plain language of the restrictive covenants.

2. The restrictive covenant's clear and unambiguous language does not restrict the use of Canal Heights to only residential uses.

The only mandate in the restrictive covenants that the Respondents' rely upon is that the lots are to be described as residential. CP 36. Notably absent from the restrictive covenants is an express covenant limiting the uses and/ or purposes of the lots to only those uses and purposes that are residential. CP 36. More importantly, the restrictive covenants clearly allow nonresidential uses so long as those uses are not noxious, offensive, or a nuisance.

For example, paragraph three (3) of the restrictive covenants explicitly allows lot owners to conduct "trade" on their lots. CP 36. "Trade" is defined as, "the act or business of exchanging commodities by barter; or the business of buying and selling for money."<sup>2</sup> Paragraph three (3) also allows lot owners to conduct other "activity" on their lots. CP 36.

Without a "clearly expressed" restriction on the use or purpose, a restriction on how to describe the lots cannot be extended by implication

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<sup>2</sup> BLACK'S LAW DICTIONARY 1665 (4th ed. 1968).

to include a restriction on the lots' use or purpose. *See Parry*, 68 Wn.App. at 669. Furthermore, the court cannot rely upon the use of the term "residential" in the restrictive covenants to extend restrictions by implication of the use of the term. *Id.* Had the parties intended to limit the lots to only residential uses and purposes, the restrictive covenants could have provided for such restrictions *Burton*, 65 Wn.2d at 622.

Here, Grigg's proposed use of Lots 1 and 29 is not a restricted nonresidential use under the restrictive covenants. The store Grigg wishes to operate will allow Grigg to engage in the trade of selling hardware and home goods. CP 32. Trade activity is allowed under the restrictive covenants so long as it is not noxious, offensive, or a nuisance. CP 36.

First, Grigg's proposed use of Lots 1 and 29 is not noxious. An activity is noxious if it is "hurtful, harmful, injurious, or destructive." *Johnson v. Northport Smelting & Refining Co.*, 50 Wash. 567, 569, 97 P. 746 (1908). The Respondents failed to present any evidence or facts that Grigg's proposed use would be noxious. Rather, Respondents merely posed a question to the trial court asking if a parking lot and delivery trucks would be noxious. CP 50. Respondents did not actually plead with any specificity as to how a parking lot and/ or delivery trucks would be considered noxious, which is required under CR 56. *See CR 56(e)*.

Second, Grigg's proposed use of Lots 1 and 29 is not offensive. An activity is offensive if it is "noxious, causing annoyance, discomfort, or painful or disagreeable sensation."<sup>3</sup> Again, Respondent's failed to cite any facts that would even suggest Grigg's proposed use would be offensive. CP 50.

Third, Grigg's proposed use of Lots 1 and 29 is not a nuisance. An activity is a nuisance if it is "an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment with the life and property" or, it is "injurious to health or indecent or offensive to the senses..." RCW 7.48.01. Once again, Respondents did not present any facts to suggest that Grigg's proposed use would be a nuisance. CP 50. The lower court's finding to the contrary is not supported by any facts or evidence presented by the Respondents. *See* RP 40.

Because the covenants clearly permit Grigg's proposed "trade" activity on Lots 1 and 29, and because Plaintiffs failed to plead with any specificity how the proposed use would be noxious, offensive, or a nuisance, the lower court should have found Grigg's proposed use complies with the restrictive covenants. CP 36. Thus, the lower court should have granted Grigg's Motion for Summary Judgment and denied Respondents'. CP 142.

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<sup>3</sup> BLACK'S LAW DICTIONARY 1233 (4th ed. 1968).

3. The restrictive covenant's clear and unambiguous language allows Canal Heights landowners to build nonresidential structures.

Before the January 6, 1949 amendment, the restrictive covenants restricted the Canal Heights landowners to building only one single-family dwelling and one two car garage on their lots. CP 36. However, with the amendment, landowners are now allowed to build any structure on their lots. CP 36.

The parties clearly intended to allow landowners to build any structure because they explicitly removed the clearly expressed restrictions on building types. *See Burton*, 65 Wn.2d at 619—22. Accordingly, the building that Grigg plans on building is not restricted by the restrictive covenant's clear and unambiguous language. CP 36.

Contrary to the lower court's finding, the fact that the building proposed by Grigg is "distinctly different" from surrounding homeowners does not mean the proposed building is prohibited under the restrictive covenants. RP 40. Rather, the only restrictions that apply to structures in Canal Heights lots apply to residential buildings. Grigg's proposed building is not a residential structure, thus the restrictive covenant's building restrictions are inapplicable. CP 36. To rule otherwise would require an impermissible extension of restrictions that are not clearly expressed in the restrictive covenants. *See Parry*. 68 Wn. App. at 669.

Therefore, the lower court should have found Grigg's proposed use complied with the restrictive covenants, granted Grigg's Motion for Summary Judgment, and denied Respondents'. CP 142.

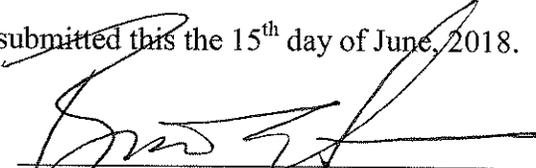
#### **VI. ATTORNEY'S FEES AND COSTS**

Grigg respectfully requests that this Court award Grigg attorney's fees and costs pursuant to RAP 18.1.

#### **VII. CONCLUSION**

This court should reverse the trial court's ruling and deny granted Respondent's Motion for Summary Judgment. This Court should also reverse the lower's court's ruling and grant Grigg's Motion for Summary Judgment with an award of attorney's fees and costs.

Respectfully submitted this the 15<sup>th</sup> day of June, 2018.



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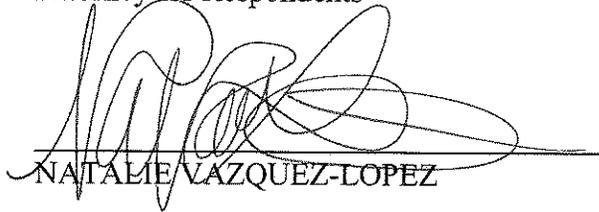
**CERTIFICATE OF SERVICE**

On June 15<sup>th</sup>, 2018, I served the Opening Brief of Appellant, Grigg

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**Comments:**

Opening Brief of Appellant Grigg Family LLC

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